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No. 92-1027

In The

# Supreme Court of the United States

October Term, 1992

CRAYTON K. TURNER and DONNA TILLMAN TURNER,

*Petitioners,*

*vs.*

OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Respondents, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), disagree with Petitioners' statement of the questions presented for review. The questions presented for consideration are:

1. Whether summary judgment dismissing Petitioners and Intervenor's claims was appropriate when there was no genuine issue of material fact in dispute and no basis for the claims as a matter of law.

2. Whether summary judgment dismissing Petitioners and Intervenor's claims was appropriate where the courts below correctly found that Respondents were not liable under the rationale of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981) and its progeny.

## LIST OF INTERESTED PARTIES

1. Crayton K. Turner – Petitioner/Plaintiff

2. Donna Tillman Turner – Petitioner/Plaintiff

3. Harold M. Wheelahan, III and Dawn Adams Wheelahan, Attorneys for Petitioners/Plaintiffs

4. Coastal Cargo, Inc. – Petitioner Crayton K. Turner's Employer

5. CIGNA Insurance Companies – Intervenor

6. Peter L. Hilbert, Kathleen K. Charvet, and the law firm of McGlinchey, Stafford, Cellini & Lang – Attorneys for CIGNA Insurance Companies

7. Ocean Nymph Shipping Co., Ltd. – Respondent/Defendant

8. Columbia Shipmanagement Limited – Respondent/ Defendant

9. Robert H. Murphy, Lawrence R. Plunkett, Jr., and the law firm of Murphy, Williams, Rogers & Sloss, Attorneys for Respondents/Defendants

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), submit that there is no basis for granting a writ of certiorari in this case. Petitioners, a longshoreman and his wife, brought suit under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.* The district court was presented with the undisputed material facts and viewing all material facts most favorably to the non-movants,

together with the application of the appropriate law, granted summary judgment dismissing Petitioners' suit. The Court of Appeals correctly affirmed the district court. The decisions of the Court of Appeals and the district court neither raise any unsettled issues warranting this Court's attention, nor conflict with any decision of this Court or any United States Court of Appeals. Furthermore, Petitioners' writ application is essentially a verbatim duplication of the arguments presented to and soundly rejected by the Fifth Circuit Court of Appeals. Petitioners have presented no compelling reason for granting certiorari to review a carefully reasoned summary judgment completely supported by the contolling law. Petitioners' application for a writ of certiorari should, therefore, be denied.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition Below

Petitioners, Crayton K. Turner and Donna Tillman Turner, filed suit on February 28, 1990 under the Longshore and Harbor Workers' Compensation (LHWCA), 33 U.S.C. § 901, *et seq.*, against Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), respectively the owner and operator of the M/V SUCRE. Crayton K. Turner ("Turner"), a longshoreman employed by Coastal Cargo, Inc. ("Coastal"), alleged that Columbia had negligently caused his injury when he fell while attempting to jump to a container during cargo operations aboard the vessel. CIGNA Insurance Companies, Coastal's compensation carrier, subsequently intervened to recover benefits paid to Petitioners under the LHWCA.

Columbia filed a motion for summary judgment on July 30, 1991. By minute entry and judgment dated September 3, 1991, the district court granted Columbia's motion and dismissed Petitioners' suit. (Writ Petition, pp. A-1 - 5). Following the denial

on October 1, 1991 of their motion for new trial, (Writ Petition, p. A-6), Petitioners and Intervenor appealed to the United States Court of Appeals for the Fifth Circuit. On September 25, 1992, the Fifth Circuit affirmed the decision of the district court. (Writ Petition, pp. A-7 - 8).

**B. Statement of Facts**

The M/V SUCRE is an ocean-going general cargo vessel which was owned and operated by Columbia in January 1990. The vessel's design accommodated containerized cargo and allowed the stowage of a 20-foot container athwartship, on a four-legged pedestal, just aft of the vessel's Nos. 1 and 2 pedestal crane and just forward of the No. 2 hold near the port side. This location is known as stowage position "EP-41". A 20-foot container on this pedestal is level with the first tier of containers stowed on the top of the No. 2 hold, but there is a 4 foot, 9 inch space (4' 09") between them. Turner was attempting to jump this chasm between container tops when he fell and was injured on January 21, 1990.

The M/V SUCRE had previously loaded containerized cargo in Miami, Florida before arriving in New Orleans and berthing at the Poland Avenue Wharf on January 21, 1990. The vessel's charterers arranged for Coastal, a New Orleans stevedore, to discharge some of the containers, load additional containers and restow certain other containers. Upon the vessel's arrival, Coastal's general superintendent, Edward Stettinius, boarded the M/V SUCRE and inspected the vessel and the cargo before Coastal began its operations. (Writ Petition, pp. A-12 - 13). Stettinius' inspection of the M/V SUCRE did not reveal any hazardous conditions, and he was satisfied that Coastal could carry out its cargo operations safely. (Writ Petition, p. A-13). Coastal's cargo operations began at 1430 hours on January 21, 1990, and during the entire discharge and loading operations, the Coastal longshoremen made no complaints of any alleged hazardous condition aboard the vessel either to any Coastal foreman or superintendent or to any of

the vessel's crew. (Writ Petition, p. A-13). Specifically, no one complained about any oil or foreign substance on any container top. (Writ Petition, p. A-13). During cargo operations, certain containers were discharged from the M/V SUCRE and set on the wharf to be restowed aboard the vessel at a later time. One of the containers discharged and designated for restowing was container No. INNU 2109086 (hereinafter designated "the 20-foot container"). This container had been loaded by stevedores in Miami, Florida. Coastal discharged this container and placed it on the Poland Avenue Wharf sometime before the evening meal break at 1800 hours on January 21, 1990. (Writ Petition, p. A-14). Thereafter, between 2150 hours and 2320 hours, Coastal restowed the container aboard the vessel in the EP-41 position on the pedestal just forward of the No. 2 hold. (Writ Petition, p. A-14).

Cargo operations were uneventful until 2320 hours, when Turner attempted to jump from "the 20-foot container," stowed in the EP-41 position, across the 4 foot, 9 inch (4' 09") space onto the row of containers atop the No. 2. hold. Turner sustained injury when he failed to leap far enough, falling between the wharf and the vessel and landing on a piling below.

Container jumping is widely known as an unsafe practice in the longshoring industry. (Writ Petition, pp. A-14 - 15). Turner's fellow Coastal longshoremen agreed that the safest method of moving between container tops is to climb down and up with a ladder. (Writ Petition, p. A-15). General superintendent Stettinius confirmed that Coastal's safety rules prohibited container jumping and that climbing was one of the approved means of moving from container to container. (Writ Petition, p. A-15). Uncontroverted evidence established that Turner routinely disregarded his employer's safety rules and jumped between containers. (Writ Petition, p. A-15). Turner did so even after Coastal's supervisors had specifically warned him not to container jump. (Writ Petition, p. A-15).

When Turner jumped from "the 20-foot container" on January 21, 1990, there was oil on it. This container had been discharged by Coastal, moved by Coastal's equipment on the wharf and restowed by Coastal aboard the vessel earlier that day. Columbia submitted scientific data establishing that the oil on the container top actually came from Coastal's leaky container-moving equipment. However, the district court determined it was not necessary to consider Columbia's scientific evidence to rule on this summary judgment motion. Instead, the district court accepted Petitioners' contention, based on the Coastal longshoremen's testimony, that oil was on top of this container when it was originally discharged from the vessel.[1] (Writ Petition, p. A-16). Whatever its source, the oil was plainly visible to the Coastal longshoremen during cargo operations, both when the container was on the vessel and when it was on the wharf in Coastal's custody. (Writ Petition, pp. A-4, 16).

Even though the longshoremen had observed oil on this container top before the initial discharge, they admittedly did not report it either to their stevedoring foreman and superintendent or to the vessel's crew. (Writ Petition pp. A-16-17). Nor did the Coastal longshoremen attempt to clean up this oil with the available oil spill materials, either when it was on the vessel or on the wharf. (Writ Petition, A-13). According to Coastal's safety policy, the longshoremen should have reported this condition or corrected it themselves. (Writ Petition, pp. 16-17).

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1. Petitioners also alleged that the vessel's Nos. 1 and 2 pedestal crane leaked oil during this cargo opertion, as well as during previous trips to New Orleans. This allegation is completely irrelevant to this matter, as will be discussed more fully below, because the district court accepted Petitioners' contention that the oil was present on top of the container prior to Coastal's commencement of cargo opeations. The district court held that "even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under *Scindia*." (Writ Petition, p. A-3).

Significantly, Turner had no reason to be in any hurry to move from "the 20-foot container" at position EP-41 to the other row of containers atop the No. 2 hold. When he jumped, a crane was being re-rigged to accommodate a different sized container, and no cargo opertions were underway. (Writ Petition, p. 15). Turner could have easily used an alternative, approved method for moving from container top to container top. No time constraints or job pressure caused him to jump or made using a ladder impractical.

## REASONS FOR DENYING THE WRIT

### I.

### THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN THIS § 905(b) CASE, BASED ON UNDISPUTED MATERIAL FACTS, AND THE FIFTH CIRCUIT CORRECTLY AFFIRMED.

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the record discloses that "there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law." Once the moving party demonstrates the absence of a material fact by reference to the pleadings, discovery and affidavits on file, the non-moving party bears the burden of designating specific facts demonstrating a genuine issue with regard to a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The mere existence of some disputed matter does not defeat a motion for summary judgment. Only disputes over material facts, that is, facts affecting the outcome of the lawsuit under governing law, will preclude the district court from granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply

show that there is some metaphysical doubt as to the material facts. . . . In the language of the rule, the non-moving party must come forward with 'specific facts showing there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Petitioners' argument that summary judgment was improper because there were disputed issues of material fact affecting the outcome of this lawsuit is meritless. Columbia emphasizes to the Court that Petitioners' writ petition does not dispute that Turner was container jumping at the time of this accident, that container jumping is widely known in the stevedoring industry to be a dangerous practice, that Coastal prohibits its longshoremen from container jumping, that Coastal had specifically warned Turner not to container jump before this accident, that oil was on top of the container, and that the oil was easily visible to the Coastal longshoremen well before the accident. These material facts are undisputed. Summary judgment was properly granted based on Petitioners' *own* version of the facts.

Petitioners argue that the courts below erred in granting summary judgment because there was a factual dispute whether the oil was on top of one container when it arrived in New Orleans, as contended by Petitioners, or whether the oil came from Coastal's leaking top end loader, as contended by Columbia. While there were underlying factual questions as to the source of the oil on the container top and when it accumulated there, this dispute is immaterial. Columbia's motion for summary judgment set forth three alternative scenarios as to the source of the oil on top of "the 20-foot container": Scenario 1, that the oil was present before Coastal Cargo began its cargo operations; Scenario 2, that the oil accumulated after initial discharge of the container, but before it was restowed, and therefore originated from Coastal Cargo's top end loader; and Scenario 3, that the oil was not present when the

vessel was inspected, but accumulated during cargo operations and originated from the vessel's gear. Columbia submitted to the district court that summary judgment was warranted under any of these three possible scenarios.

The district court applied Scenario 1, *accepting Petitioners' contention that the oil was on the container top before it was discharged from the vessel.* The district court's acceptance of Petitioners' factual contention was proper and in keeping with the court's duty to view the facts most favorable to the non-movant. *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir. 1986); *Hunter v. Navrom*, 868 F.2d 1386 (5th Cir. 1989). *Accepting Petitioners' factual allegations as true,* the district court correctly concluded that Columbia was entitled to a judgment of dismissal as a matter of law:

> Even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under *Scindia.*

(Writ Petition, p. A-3).

For the purposes of its motion for summary judgment, Columbia did not dispute that oil was on top of the container before it was discharged from the vessel. Since the district court accepted Petitioners' factual version that there was oil on the container before discharge, there clearly was no genuine factual dispute between the parties on this issue. Petitioners admit this point at p. 5 of their writ petition:

> Turner alleges that the oil on the container came from the cranes on the M/V SUCRE. Defendant disputes that fact. *For purposes of*

> *ruling on defendant's motion, the trial court assumed that the oil was present on top of the container from the beginning of the cargo operations and did not come from the stevedore's top end loader. . . .*

(Emphasis added). (Writ Petition, p. 5). Petitioners' writ petition is contradictory. While they acknowledge that the district court accepted their version of this factual issue when considering the motion for summary judgment, they nonetheless make the erroneous claim that a material fact on the oil issue was in dispute:

> There was oil on top of the container when it arrived in the Port of New Orleans. The defendant claims that the oil on the container came from the loading operations conducted by plaintiff's employer. *This factual dispute, standing by itself, should cause this Court to reverse the Trial Court.*

(Writ Petition, p. 6). Petitioners blindly fail to recognize that Columbia conceded their factual contention that oil was present on top of the container when it arrived in New Orleans, and that the district court accepted that scenario as fact for purposes of the motion for summary judgment. Concisely, there was no dispute of fact on this issue since Petitioners' version was accepted by the Court.

The mere contention that disputes exist on certain factual issues between parties is insufficient to defeat an otherwise properly supported motion for summary judgment. Petitioners claim that because they "disputed" 17 of Columbia's 22 statements of uncontested material facts, these denials prove there were factual issues in dispute which should prevent summary judgment. However, a review of Petitioners' alleged disputed facts clearly

shows that they failed to set forth any specific facts which constitute a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Petitioners had the burden of designating specific facts demonstrating a genuine dispute of a material fact that would affect this lawsuit's outcome under the applicable law. Petitioners failed to set forth any such issue of material fact that would affect Columbia's alleged legal liability under *Scindia* and the governing law. Therefore, the district court properly granted summary judgment and, when presented with *precisely the same argument* relied on by Petitioners in this writ application, the Fifth Circuit correctly affirmed the district court's decision. Respondents maintain there is no basis for granting a writ of certiorari on this issue.

## II.

## THE FIFTH CIRCUIT AND THE DISTRICT COURT PROPERLY CONCLUDED THAT COLUMBIA WAS NOT LIABLE UNDER *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS* AND ITS PROGENY.

### A. The Fifth Circuit And The District Court Properly Concluded That Columbia Was Not Liable Under The First *Scindia* Principle.

Accepting Turner's factual version that oil was on the container top before Coastal commenced cargo operations, the courts below properly analyzed Turner's allegations of shipowner negligence under 33 U.S.C. § 905(b) and the first principle of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). In *Polizzi v. M/V ZEPHYROS II MONROVIA*, 860 F.2d 147, 149 (5th Cir. 1988), the Fifth Circuit summarized the applicable law as follows:

> The first *Scindia* principle requires the vessel owner, before turning over the vessel to the

> stevedore, to warn the longshoreman of any hidden defects that would be known to the shipowner in the exercise of reasonable care and to exercise care to deliver the stevedore a safe ship with respect to gear, equipment, tools and work place. These duties are *not breached* if the defect causing the injury was *open and obvious* and one *that the longshoreman should have seen.* An obvious defect should be as apparent to the stevedore and its longshoremen employees as to the shipowner. (Emphasis added).

*Polizzi* involved a longshoreman who slipped in oil aboard a vessel. Affirming a jury verdict in favor of the vessel owner, the Fifth Circuit noted that the condition of oil should have been open and obvious to the stevedore and the longshoremen and that the stevedore should have taken action to correct the condition. *Polizzi* holds that a shipowner is not legally responsible for an injury caused by an obvious hazardous condition that a careless stevedore fails to remedy.

In *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 69 (5th Cir. 1987), the plaintiff longshoreman was injured when the ship's ladder he was using slipped as he was descending it. Morris claimed, and the district court found, that the ladder lacked rubber feet and that this condition had caused Morris' accident. Morris argued that the vessel owner violated the first *Scindia* principle in failing to exericise ordinary care to maintain the ladder in a reasonably safe condition and/or for failing to warn the stevedore of a hidden defect, *i.e.*, the absence of rubber feet on the ladder. The Fifth Circuit reversed the district court's judgment for the plaintiff in *Morris*, holding that the absence of rubber feet was, or should have been, obvious to the stevedore. In such circumstances, the shipowner is only liable if the

longshoreman has no alternative but to continue working in the face of obvious danger. The Fifth Circuit stated:

> We do not understand *Lemon* and *Theriot* to overrule in cases predicating the shipowner's liability on a showing of circumstances pressing the longshoremen to risk a danger notwithstanding the stevedore's knowledge of the danger. As *Pluyer* demonstrates, the longshoreman need not show that he had no possible alternative but to use the defective equipment or to work in a dangerous area. The burden is not so heavy. He need only show that the circumstances made safer alternatives unduly impractical or time consuming. In both *Lemon* and *Theriot,* the longshoremen had no alternative but to stop or delay their work . . . in this case, on the contrary, Morris and the stevedore could have avoided the danger with almost no interruption to their work by using any of the safe ladders "all around the ship" or by using one of the stevedore's own ladders, locked away on deck.

832 F.2d at 71. The *Morris* court recognized that *Scindia's* first principle entitles the shipowner to rely on an expert and experienced stevedore to act with reasonable care, and the shipowner does not have a duty to anticipate the action or inaction of a careless stevedore. In particular, a shipowner is not liable to a longshoreman injured by an obvious danger aboard a vessel when the longshoreman could have avoided the obvious danger by using a safer alternative that was not time-consuming.

In *Teply v. Mobil Oil Corp.*, 859 F.2d 375 (5th Cir. 1988), the Fifth Circuit affirmed a summary judgment dismissing a harbor

worker's Section 905(b) action against a vessel owner. The plaintiff in *Teply* allegedly slipped in oil and water while climbing down a fixed ladder aboard the vessel. The *Teply* court noted that the vessel's employees were not present and were not supervising the plaintiff's work closely and that the vessel owner "could have known of the danger only if it was so obvious that Teply could not have failed to recognize it." The Court stated:

> Ship owners are not liable for obvious dangers that injure contractors aboard their vessels unless the contractors, in order to avoid the danger, would be forced either to leave the job or to face penalties for causing delay .... There is no evidence that Teply was under any time or supervisory pressure, and a good deal of evidence to the contrary. NOEPSI [the vessel owner] therefore cannot be held liable for his fall.

859 F.2d at 378 (footnotes omitted).

Given that the oil on the container top was plainly visible to the Coastal longshoremen both when the container was on the M/V SUCRE and on the wharf, that the Coastal longshoremen could have easily remedied the danger presented by cleaning up the oil, and that there were no time pressures on the Coastal longshoremen, the courts below correctly applied *Scindia, Morris, Polizzi* and *Teply* to conclude that Columbia was not legally responsible for this injury caused by an open and obvious condition.

Furthermore, Turner's act of jumping from one container to another was a violation of established Coastal safety policies and common sense. Coastal and Turner easily could have avoided this accident if Turner had used a safe alternative method available to access the container tops, either using ladders to climb down and

up the containers or by using a ladder between the container tops as a crawling platform. Neither Turner nor Coastal presented any evidence whatsoever that these available, safe alternatives were unduly impractical or time-consuming.

The Fifth Circuit has recognized in *Morris, Polizzi* and *Teply* that if a longshoreman is injured because of an obvious danger, the shipowner is not liable unless the longshoreman can prove he had no choice but to encounter the danger because safer alternatives were unduly impractical or time-consuming. Where the longshoreman and stevedore could have avoided the danger, but failed to take reasonable steps to avoid the hazard, the vessel owner is not responsible and has no duty to anticipate the actions or inactions of a careless stevedore.[2]

*Scindia, Morris, Polizzi* and *Teply* teach that the shipowner has no duty to anticipate the actions or inactions of a careless stevedore. In this case, the stevedore and its longshoremen failed to act with reasonable care by disregarding their own safety procedures, by failing to clean up a known dangerous condition on a container top and by failing to insure that longshoremen did not

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2. While Petitioners rely on the holding in *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990), that decision is inapposite to the facts of this case. In *Treadaway* the plaintiff longshoreman was injured while walking through oil and water on the main dock, an open and obvious hazard. However, there was no safe alternative available to longshoreman Treadaway when facing this obviously unsafe condition. Thus, the court held that there was a basis for a jury to find vessel liability. In the present case, the stevedore and its longshoremen knew of the open and obvious oily condition on the container top, and there were safe alternatives available to the longshoremen. However, Coastal and its longshoremen failed to perform their job in a workmanlike manner because they did not take the easy, available steps to remedy this hazardous condition. Clearly, those safe alternaties were not unduly impractical or time-consuming. The *Treadaway* case has no applicaton to the facts of this case; rather, this case is controlled by *Morris, Polizzi* and *Teply*.

container jump. Under well-established jurisprudence, Columbia was not legally responsible for Turner's injury.

The opinion of the district court accurately stated:

> As the longshoremen's testimony shows, the patch of oil was plainly visible to them during the daylight hours when they were first unloading the container. In these circumstances, "*Scindia* entitles the shipowner to rely on an 'expert and experienced stevedore' acting with 'reasonable care' " [to] correct or warn about the hazard. *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987). Thus, in order to hold the shipowner liable, the plaintiff must also prove that "circumstances made safer alternatives unduly impractical or time-consuming." *Ibid.* The plaintiffs have presented no such evidence, nor have they presented any evidence that the stevedore was under any special time constraint; indeed, the defendants have presented evidence that at least two safer alternatives to jumping, or stepping, across container tops existed (climbing down one container and then up the other, or using a platform or ladder between the two container tops) and that oil spills are easily cleaned up such as with sand or sawdust.

(Writ Petition, p. A-4).

Accordingly, the district court correctly applied the first *Scindia* principle and found no vessel negligence. The Fifth Circuit correctly affirmed the district court's finding. The decisions of the

courts below in this longshoreman injury case under § 905(b) are well supported by the legal analysis recognized by the Supreme Court in *Scindia* and applied by the Fifth Circuit in *Morris, Polizzi* and *Teply* and provide no basis for granting a writ of certiorari.

**B. The Fifth Circuit And The District Court Properly Concluded That The Second *Scindia* Principle Does Not Apply To This Case.**

Under the second *Scindia* principle, a vessel owner is entitled to rely on the stevedore's expertise and reasonableness and has no duty to supervise or inspect the stevedore's operations, unless a contract, law or custom imposes that duty on the owner. *Scindia*, 451 U.S. at 172. Petitioners submitted no evidence suggesting that Columbia had a duty to inspect Coastal's operations under any contract, law or custom. As stated by the district court:

> There is no basis for finding that *Scindia's* second category may apply here inasmuch as there is no evidence that the shipowner was exercising any control over either the cargo containers or the vessel cranes (or over any other portion of the ship) at any time during the stevedore's operations.

(Writ Petition, p. A-4).

Petitioners cite *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir. 1989), for the proposition that obviousness of a danger is not relevant to the second *Scindia* principle. Columbia does not dispute that part of the *Masinter* holding. However, the vessel owner in *Masinter* contractually retained control of the stevedore's cargo operations, whereas Columbia did not retain control over Coastal Cargo's operations aboard the M/V SUCRE. Thus, the second *Scindia* principle, and hence *Masinter*, are irrelevant to the present case.

The lower courts' conclusion that the second *Scindia* principle was not applicable in this case was correct, because there was no evidence that Columbia exercised any control over the cargo operations. Thus, there is no basis for accepting a writ of certiorari on this issue.

**C. The Fifth Circuit And The District Court Properly Held That The Third *Scindia* Principle Does Not Apply To This Case.**

The third *Scindia* principle, known as the *Scindia* "exception," places a duty on the vessel owner to protect longshoremen when the vessel owner has *actual knowledge* of a condition that presents an unreasonable risk of harm to the longshoremen, as well as actual knowledge that the stevedore is not acting reasonably to protect the longshoremen. *Scindia*, 451 U.S. at 175-76; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983). The courts below properly concluded there was no evidence that Columbia had actual knowledge either that oil was present on the container or that the stevedore would not correct the hazard.

The *Scindia* exception certainly does not apply in this case where the M/V SUCRE's crew had no actual knowledge that there was oil on the top of "the 20 foot container," no actual knowledge that this oily condition presented an "unreasonable risk of harm," and no actual knowledge that the vessel could not rely on the stevedore to remedy this condition. The uncontroverted evidence was that no one complained to the vessel's crew that there was oil on the container top.

Furthermore, Columbia was entitled to rely on Coastal, the independent expert employed to discharge this cargo, to take the necessary actions and precautions to protect the longshoremen from any unreasonable risk of harm atop the container. Here, as in *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir. 1988), the vessel owner is not required to possess extraordinary knowledge of

a stevedore's methods of operation. Instead, the vessel owner can rely on the stevedore to carry out its operation in a workmanlike manner and not expose its employees to unreasonable risks of harm. In fact, the only precautions necessary to prevent this accident were for Coastal to supervise its employees properly to prevent "container jumping," and for the longshoremen to follow Coastal's policy to report or remedy any unsafe condition.

The lower courts correctly found the third *Scindia* principle has no applicaton to this case. There was no evidentiary support that Columbia had actual knowledge of an unreasonable risk of harm to the longshoremen, or actual knowledge that Coastal was acting unreasonably in failing to protect the longshoremen. Accordingly, there is no basis for granting a writ of certiorari on this issue.

## CONCLUSION

The district court properly accepted Petitioners' factual version of this incident and correctly concluded that there were no genuine issues of material fact from which a jury could find Columbia legally liable under *Scindia* and its progeny. Based on Petitioners' appellate brief, which mirrors Petitioners' writ application, the Fifth Circuit correctly affirmed the district court's decision. The undisputed facts established that the M/V SUCRE was in a condition such that an expert and experienced stevedore, acting with reasonable care, could safely perform its cargo operations with reasonable safety to its longshoremen. The condition allegedly causing Turner's injury was open, obvious, and known to Coastal and its longshoremen, and this condition easily could have been avoided or remedied by Coastal and its employees.

The courts below properly concluded that Columbia had not breached any legal duty under the first *Scindia* principle. Columbia

had no reason to anticipate the actions or inactions of this careless stevedore and its longshoremen, who failed to clean up an open, obvious and known oily condition, or the actions of a reckless longshoreman, Turner, who attempted container jumping in violation of his employer's safety rules, particularly where a safe alternative transfer method was readily available.

Finally, the district court properly found that Columbia had no duty to supervise or intervene in Coastal's cargo operatons, since there was no evidence that Columbia had actual knowledge of any unreasonable risks of harm — the oil on the container top and Turner's container jumping — or actual knowledge that Coastal was not taking reasonable action to protect its longshoremen. The Fifth Circuit correctly affirmed these findings of the district court.

Petitioners have presented no meritorious reasons for granting certiorari. Petitioners' writ application is simply a reproduction to this Court of exactly the same arguments which were presented to the Fifth Circuit and completely rejected by that Court. There is no basis whatsoever for Petitioners' allegations of error on the part of the district court in granting Columbia's motion for summary judgment or the Fifth Circuit affirmance of the district court's decision. For the reasons discussed, Respondents respectfully submit that this Court should deny Petitioners' request for a writ of certiorari.

Respectfully submitted,

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